UNITED STATES OF AMERICA	)	**PROSECUTION RESPONSE TO DEFENSE MOTION TO DISMISS**
v.	)	**(VIOLATION OF COMMON ARTICLE 3 OF THE GENEVA CONVENTIONS)**
SALIM AHMED HAMDAN	)	
		15 October 2004

1. Timeliness. This motion response is being filed within the timeline established by the Presiding Officer.

2. Prosecution Position on Defense Motion. The Defense motion to dismiss should be denied. The Defense contends that the Military Commission convened in this case is bound by the provisions of Common Article 3 of the Geneva Conventions. This is incorrect as a matter of law and must be denied.

3. Facts in Agreement. The Prosecution does not agree with or stipulate to any of the Defense's facts as alleged except fact (l). The Prosecution will continue to work with the Defense to obtain a stipulation of fact.

4. Facts.

a. The President's Military Order of 13 November 2001, concerning the Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism, authorizes the Secretary of Defense or his designee to convene military commissions for the trial of certain individuals "for any and all offenses triable by military commission."

b. The Secretary of Defense promulgated implementing orders to establish procedures for the appointment of military commissions, setting forth various rules governing the appointment, jurisdiction, trial and review of military commissions.

c. The accused in this case was designated by the President for trial by military commission and a commission was appointed by the Appointing Authority in accordance with commission orders and instructions.

5. Legal Authority.

a. The Geneva Convention Relative to the Treatment of Prisoners of War, 6 U.S.T. 3316 (1955).

b. *Hamdi v. Rumsfeld*, 316 F.3d 450 (4th Cir. 2003).

c. *Al Odah v. United States*, 321 F.3d 1134 (D.C. Cir. 2003).

d. *Rasul v. Bush*, 124 S.Ct. 2686 (2004).
e. *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812).
f. *New York Life Ins. Co. v, Hendren*, 175 U.S. 677 (1900).
g. *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984).
h. *Handel v. Artukovic*, 601 F.Supp. 1421 (C.D. Cal. 1985).
i. War Crimes Act of 1996, 18 U.S.C. § 2441.
j. *Johnson v. Eisentrager*, 339 U.S. 763 (1950).
k. *United States v. Noriega*, 808 F.Supp. 791 (S.D. Fla. 1992).
l. *United States v. Lindh*, 212 F.Supp.2d 541 (E.D. Va. 2002).
m. Memorandum for the Vice President, et al. From President, Re: Humane Treatment of al Qaeda and Taliban Detainees (Feb. 7, 2002).

6. Analysis

The Defense argues that the Accused's status under the Geneva Conventions has not yet been determined by a competent legal authority and he is therefore entitled to prisoner of war status and protections until such time as his status is legally resolved. The Defense further contends that even if the Accused is not entitled to prisoner of war status, he is entitled to the protections of Common Article 3 of the Geneva Conventions and Commission Law fails to satisfy the minimum standards of due process required by Article 3(1)(d).[1]

Contrary to the Defense assertions, the status of the Accused has been determined by the President and confirmed by the subsequent review process. Moreover, the Geneva Conventions invoked by the Defense do not apply to the Accused. First, al Qaeda is not a State and thus cannot receive the benefits of a State party to the Conventions. Second, al Qaeda members fail to satisfy the eligibility requirements for treatment as POWs under the Geneva Convention III (GPW). Third, the international character of the conflict precludes application of common article 3 of the Geneva Conventions. Fourth, even if the standards of common article 3 have become part of customary international law, they are not self-executing, and the Commission must follow Commission Law. Finally, Commission Law provides procedural protections for the Accused that meet the minimal baseline standards of customary international law.

a. The Status of the Accused Under the Geneva Conventions Has Been Determined By the President.

The Defense motion considered here asserts first that the status of the Accused under GPW is in doubt and therefore must be resolved by procedures set forth in Article 5 of that Convention. However, the President has declared that the GPW does not apply to al Qaeda. *See Memorandum for the Vice President, et al. From President, Re:*

[1] Common Article 3 provides in relevant part: "Article 3. In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:…(1)(d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples."

Humane Treatment of al Qaeda and Taliban Detainees, at 1 (Feb. 7, 2002).[2] The President's memorandum should be given deference by the Commission.

The Geneva Conventions do not apply to every conceivable armed conflict. Common Article 2 of the GPW provides for only three circumstances in which the Conventions apply: (a) in "all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties;" (b) in 'all cases of partial or total occupation of the territory of a High Contracting Party;" or (c) when a non-signatory "Power[] in conflict" "accepts and applies the provisions [of the Convention]." Because the armed conflict between the United States and al Qaeda satisfies none of these situations, the Geneva Conventions do not apply to al Qaeda fighters such as Hamdan.

The U.S.-al Qaeda armed conflict is not one "between two or more of the High Contracting Parties" within the meaning of Article 2. Al Qaeda has not signed or ratified the GPW, nor could it. Al Qaeda is not a State; rather, it is a terrorist organization composed of members from many nations, with ongoing military operations in many nations. In addition, the U.S.-al Qaeda armed conflict has not resulted in the "occupation of the territory of a High Contracting Party" within the meaning of Article 2. As a non-State actor, al Qaeda has no territory that could be occupied within the meaning of Article 2. Nor is it a "Power in conflict" that can "accept and apply" the Convention. *See, e.g.*, G.I.A.D. Draper, *The Red Cross Conventions* 16 (1958) (arguing that "in the context of Article 2, para. 3, 'Powers' means States capable then and there of becoming Contracting Parties to these Conventions either by ratification or by accession"); 2B *Final Record of the Diplomatic Conference of Geneva of 1949*, at 108 (explaining that article 2(3) would impose an "obligation to recognize that the Convention be applied to the non-Contracting adverse State, in so far as the latter accepted and applied the provisions thereof" (emphasis added). In any event, far from embracing the Convention or any other provision of the law of armed conflict, al Qaeda has consistently acted in flagrant defiance of the law of armed conflict. Thus the Accused in this case cannot claim the protections afforded to POWs under the Third Geneva Convention.

Nonetheless, the Defense implies that because the Accused did not receive a tribunal pursuant to GPW Article 5, the Accused must receive the protections accorded to a POW until such a tribunal determines otherwise. The Defense cites Army Regulation (AR) 190-8 as his bases for this claim. Defense's reliance on AR 190-8 is misplaced.

AR 190-8 is binding on the Army during its operations but does not create any private rights enforceable by the Accused. However, as cited by the defense, AR 190-8 requires only that the Army abide by the provisions of GPW Article 5. GPW Article 5 reads:

> The present Convention shall apply to the persons referred to in Article 4 from the time they fall into the power of the enemy and until their final release and repatriation.

[2] This Presidential document is available at www.library.law.pace.edu/government/detainee_memos.html.

> *Should any doubt arise* as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.

Id. (emphasis added). The circumstances of the Accused's capture have already been detailed. He has confessed to pledging a loyalty oath to Usuma bin Laden and his own attorney has admitted that the Accused was a driver for him, the leader of al Qaida. There was no doubt about the Accused's status as an unlawful combatant at the time the President made the original determination or during the subsequent review process. As such, AR 190-8 has been fully complied with and the denial of an Article 5 tribunal in no way affects that.

Because the Accused's lack of POW status is so clear, it is equally clear that an Article 5 tribunal was not necessary in his case.

b. The Geneva Conventions Do Not Apply To the United States' Armed Conflict Against Al Qaeda Under the Terms of Common Article 3.

The Defense argues that the Accused is entitled to the protections of common article 3 of the Geneva Conventions. First, as discussed above, the President has determined that the Geneva Conventions do not apply to the armed conflict with al Qaeda in any case. Even if the Conventions applied, Article 3 applies only "[i]n the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties." The armed conflict in which the United States is currently engaged is not an internal conflict, because the United States is prosecuting it in both Afghanistan and around the globe. Thus, by its own terms, Article 3 does not apply to the conflict pursuant to which Hamdan remains confined, so Hamdan cannot invoke it.

Common Article 3 is a unique provision that governs the conduct of signatories to the Conventions in a particular kind of conflict that is not one between High Contracting Parties to the Conventions. Common Article 3 complements common article 2. Article 2 applies to cases of declared war or of any other armed conflict that may arise between two or more state parties to the Conventions, even if a state of war is not recognized by one of them. Common article 3, however covers "armed conflicts not of an international character" that occurs within the territory of one of the High Contracting Parties.

Common article 3's text strongly suggests that it applies specifically to a condition of civil war or a large-scale armed conflict between a state and an armed movement within its own territory. First the text of the provision refers specifically to an armed conflict that is not international and occurs in the territory of a state party to the Convention. It does not encompass all armed conflicts, nor does it address a gap left by common article 2 for international armed conflicts that involve non-state entities (such as international terrorist organizations) as parties to the conflict. Further, common article 3 addresses only non-international conflicts that occur within the territory of a single state

party, as in a civil war. This provision would not address an armed conflict in which one of the parties operated from multiple bases in several different states.

This interpretation is supported by the commentators. One well-known commentary states that "a non-international armed conflict is distinct from an international armed conflict because of the legal status of the entities opposing each other: the parties to the conflict are not sovereign States, but the government of a single state in conflict with one or more armed factions within its territory." *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, at ¶4339 (Yves Sandoz et al., eds. 1987). A legal scholar writing in the same year in which the Conventions were prepared stated that "a conflict not of an international character occurring in the territory of one of the High Contracting Parties…must normally mean a civil war." Joyce A.C. Gutteridge, *The Geneva Conventions of 1949,* 26 Brit. Y.B. Int'l L. 294, 298-99 (1949).

The United States has accepted the proposition that the basic standards of common Article 3 have become customary international law in state practice. Recent opinions by international courts have also taken the view that the protections of common article 3 have become customary international law. *See Prosecutor v. Tadic,*Case No. 160 (ICTY Appeals Chamber, October 2, 1995). In this conception, common article 3 is not just a complement to common article 2, it is a catch-all that establishes standards for any and all armed conflicts not included in common article 2.

c. Customary International Law Is Not Self-Executing and Not Binding Directly On the Commission.

Even though common article 3 does not apply on its own terms, the amicus briefs incorporated by the Defense in this motion argue protections of article 3 have attained universal recognition as customary international law that such "universal principles" are binding on the Commission. The prosecution agrees that minimum protections of common article 3 have indeed become part of customary international law. However, the Commission need not determine how such "universal principles" might apply to Commission proceedings in this case, because the standards of customary international law are not self-executing—that is, they must be incorporated into US law by affirmative legislative action. Standing alone, they do not create private rights enforceable by the Accused. The Commission must follow Commission Law promulgated by the President and Secretary of Defense under United States law.

That the GPW is not self-executing is demonstrated in the text of the GPW, its legislative history, and case law. Indeed the GPW contains many provisions that, when considered together, demonstrate that the contracting parties understood that violations of the treaty would be enforced through diplomatic means. As the Fourth Circuit recently explained:

> What discussion there is [in the text of the GPW] of enforcement focuses entirely on the vindication by diplomatic means of treaty rights inherent in sovereign nations. If two warring parties disagree about what the Convention requires of them, Article 11

> instructs them to arrange a "meeting of their representatives" with the aid of diplomats from other countries, "with a view to settling the disagreement." Geneva Convention, at Article 11. Similarly, Article 132 states that "any alleged violation of the Convention" is to be resolved by a joint transnational effort "in a manner to be decided between the interested Parties." Id. at art. 132; cf. id. at arts. 129-30 (instructing signatories to enact legislation providing for criminal sanction for "persons committing . . . grave breaches of the present Convention"). We therefore agree with other courts of appeals that the language in the Geneva Convention is not "self-executing" and does not "create private rights of action in the domestic courts of the signatory countries."

Hamdi v. Rumsfeld, 316 F.3d 450, 468-469 (4th cir. 2003), vacated on other grounds, 124 S.Ct. 2686 (2004). See also *Al Odeh v. United States*, 321 F.3d 1134, 1147 (D.C. Cir. 2003) (Randolph, J., concurring), overruled on other grounds, *Rasul v. Bush*, 124 S.Ct. 2686 (2004); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 808-810 (D.C. Cir. 1984) (Bork J., concurring); *Handel v. Artukovic*, 601 F.Supp. 1421, 1424-1426 (C.D. Cal. 1985). The Fourth Circuit alluded to the fact that there was one area in which the contracting parties sought to go beyond diplomacy to enforce violations of the treaty: "grave breaches," which the parties pledged to punish themselves by enacting domestic criminal legislation. GPW Article 129. Congress responded by enacting the War Crimes Act of 1996, 18 U.S.C. § 2441. That Act provides a means for remedying grave breaches, but does not create any privately enforceable rights. The Executive Branch, through its ability to bring prosecutions, remains responsible for ensuring adherence to the treaty. In light of this clear textual framework for enforcing the treaty, there is no sound basis on which to conclude that the treaty provided individuals with private rights of action.

The legislative history of the GPW does not suggest otherwise. In fact, the Senate Report makes clear that the GPW is not self-executing. In the section titled "Provisions Relating To Execution Of The Conventions," the Report states that "the parties agree, moreover, to enact legislation necessary to provide effective penal sanctions for persons committing violations of the contentions enumerated as grave breaches." S. Exec. Rep. No. 84-9 (1955), at 7. The Report celebrates this provision as "an advance over the 1929 instruments which contained no corresponding provisions." Id.

Significantly, the Supreme Court interpreted the 1929 Geneva Convention in *Johnson v. Eisentrager*, 339 U.S. 763 (1950), and held that it was not self-executing. The Court ruled there that the German prisoners of war who were challenging the jurisdiction of the military commission which convicted them could not invoke the Geneva Convention because:

> It is . . . the obvious scheme of the Agreement that responsibility for observance and enforcement of these rights is upon political and military authorities. Rights of alien enemies are vindicated under it only through protests and intervention of protecting

> powers as the rights of our citizens against foreign governments are vindicated only by Presidential intervention.

Id. at 789. It should be noted that the Senate that ratified the 1949 GPW was operating post-*Eisentrager*, yet no mention was made of the new GPW or its implementing legislation creating an individually actionable right. Moreover, in addressing how future compliance with the treaty would be achieved, the Senate Report did not mention legal claims or judicial machinery, but instead observed that "the weight of world opinion," would "exercise a salutary restraint on otherwise unbridled actions." S. Exec. Rep. at 32.

Given that it is apparent on the face of the treaty and from the legislative history that the parties contemplated the need for enacting legislation, the Fourth Circuit's conclusion in *Hamdi* that the GPW is not self-executing is undoubtedly correct. As such, the Accused's claim motion should be denied on those grounds.[3] [4]

The consistent holding of the federal courts that the Geneva Conventions are not self-executing, applies with even greater force when the principles of customary international law are at issue (as opposed to treaty law under the Geneva Conventions). The Constitution does not confine presidential or federal power within the brackets of customary international law. When the Supremacy Clause identifies the sources of federal law, it enumerates only "this Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States." U.S. Constitution, Article VI, Cl. 2. Customary international law is nowhere mentioned in the constitution as an independent source of federal law or as a constraint on the political branches of government. Indeed, if it were, there would have been no need to grant Congress the power to "define and punish…Offenses against the Law of Nations." U.S. Const. art. I, §8, cl. 10.

Allowing customary international law to rise to the level of federal would create severe distortions in the structure of the Constitution. Incorporation of customary international law directly into federal law would bypass the delicate procedures established by the Constitution for amending the Constitution or enacting legislation. Customary international law has not undergone the difficult constitutional hurdles that

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[3] *United States v. Lindh*, 212 F.Supp.2d 541 (E.D. Va. 2002), although permitting the assertion of the GPW "as a defense to criminal prosecution," is not controlling in this instance because the Fourth Circuit, a superior court, in *Hamdi* subsequently held the GPW to be non-self-executing. *Hamdi* at 468. Moreover, the case of *United States v. Noriega*, 808 F.Supp. 791 (S.D. Fla. 1992), also offers nothing of substance to the issue. First, *Noriega* was an advisory opinion by a district court. Id. at 799. Second, *Noreiga's* reasoning was that the non-grave-breach articles of the GPW were self-executing specifically because the GPW did not call for implementing legislation. *Id*. at 797. Thus, by the very reasoning in *Noreiga*, Article 103 of the GPW, a grave breach, would not be self-executing as they require implementing legislation pursuant to the plain language of the treaty.

[4] Additionally, the argument that the United States has already implemented the GPW by way of AR 190-8 is spurious. First, the War Crimes Act of 1996, 18 U.S.C. § 2441, is Congress' implementation of the GPW and its legislative history says that. AR 190-8, on the other hand, was enacted to implement DoD Directive 2310.1. DoD Directive 2310.1 merely establishes the Department of Defense's policy with regard to observing the international law of war, including the GPW. The policy of an agency subordinate to the Chief Executive cannot seriously be posited to be the United State's implementing legislation to an international treaty when Congress, the United State's legislative body, was specifically charged with enabling legislation and actually did enact enabling legislation.

stand before enactment of constitutional amendments, statutes, or treaties. As discussed above, even the inclusion of treaties in the Supremacy Clause does not render treaties automatically self-executing in federal court, not to mention against the executive branch. If even treaties that have undergone presidential negotiation and signature and advice and consent of the Senate can have no binding legal effect in the United States until incorporated into U.S. law, then clearly customary international law cannot be self-executing either.

It is well established that the political branches have ample authority to override customary international law within their respective spheres of authority. This has long been recognized by the Supreme Court. *See The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 145-46 (1812)(applied customary international law to seizure of a French warship only because the U.S. had not chosen a different rule). In *Brown v. United States*, 12 U.S. (8 Cranch) 110 (1814), Chief Justice Marshall stated that customary international law "is a guide which the sovereign follows or abandons at his will." Id., at 128. In *New York Life Ins. Co. v. Hendren*, 92 U.S. 286, 286-87 (1875), the Supreme Court acknowledged that the laws of war did not qualify as true federal law and could not therefore serve as a basis for federal subject matter jurisdiction. The Court declared that it had no jurisdiction to review "the general laws of war, as recognized by the law of nations applicable to this case," because such laws do not involve the Constitution, laws, treaties, or Executive proclamations of the United States.

Even the case most often cited for the proposition that customary international law is federal law, itself acknowledges that customary international law is subject to override by the action of the political branches. *The Paquete Habana*, 175 U.S. 677 (1900), involved the question whether U.S. armed vessels in wartime could capture fishing vessels belonging to enemy nationals and sell them as prize. The Court applied an international law rule and held that "international law is part of our law." *Id.* at 700. But Justice Gray then continued, "where there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations." *Id*. In other words, while it was willing to apply customary international as general federal common law, the Court also readily found that the political branches and even the federal judiciary could override it. No Supreme Court decision in modern times has challenged that view.

d. Commission Law Provides Procedural Protections Consistent With Common Article 3.

To the extent that Article 3 might reflects universal principles accepted as customary international law, the Accused's rights have not been violated under those standards. Hamdan has not been "sentenced without previous judgment." To the contrary, the proceedings against Hamdan are in their preliminary stages. Hamdan was charged with an offense on July 9, 2004, and that charge was approved and referred by the Appointing Authority on July 13, 2004. The case is currently scheduled for a December trial date. At his trial, Hamdan will enjoy, *inter alia*, the presumption of innocence, the assistance of counsel, and the opportunity to cross-examine prosecution witnesses, and the government will have to prove his guilt beyond a reasonable doubt. See Military Commission Order No. 1, ¶5. Moreover, any finding of guilt will be

reviewed by a review panel, the Secretary of Defense, and the President, if the President does not designate the Secretary as the final decision-maker. This process is undoubtedly consistent with the baseline protections set out in Common Article 3.

Contrary to the Defense claims, Hamdan's confinement pending his military trial does not constitute the "passing of [a] sentence[]…without previous judgment." GPW Art. 3(1)(d). Hamdan is not being confined at Guantanamo Bay as a punishment for the offense he is alleged to have committed. Rather, by virtue of being designated as eligible for trial before a military commission, Hamdan was assigned petitioner as his counsel to assist him with the legal proceedings. In order to facilitate contacts between the military commission designees and their counsel without jeopardizing security at Guantanamo, the military used a separate facility at Camp Echo to house Hamdan and the other designees. Confining Hamdan for substantial security reasons to facilitate his access to counsel pending his wartime trial does not constitute "punishment." To the contrary, it is well established that the wartime detention of an enemy combatant is a legitimate war measure, not punishment. Hamdi, 124 S. Ct. at 2640 ("The purpose of detention is to prevent captured individuals from returning to the field of battle and taking up arms once again.").

7. Resolution of Motion. The Defense Motion to Dismiss should be denied.

8. Attachment. Memorandum date 23 February 2003, Subject: In the Case of Salem Hamdan: Questions Regarding Application of Article 10, UCMJ

9. Oral Argument. The Prosecution is prepared to provide oral argument if desired.

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Commander, JAGC, USN
Prosecutor